

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 18-23538-rdd

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5 In the Matter of:

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7 SEARS HOLDINGS CORPORATION,

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9 Debtor.

10 - - - - - x

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12 United States Bankruptcy Court

13 300 Quarropas Street, Room 248

14 White Plains, NY 10601

15

16 November 19, 2018

17 1:08 PM

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21 B E F O R E :

22 HON ROBERT D. DRAIN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: UNKNOWN

1 HEARING re Notice of Continuation of Hearing on Emergency  
2 Motion of Debtors for Order Approving Sale of Medium Term  
3 Notes (related document(s)642)

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25 Transcribed by: Sonya Ledanski Hyde

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24 BY: THOMAS R. KRELLER

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P R O C E E D I N G S

THE COURT: Good afternoon. This is in re Sears Holding Corporation, et al. I had scheduled a 1:00 hearing on the Debtor's motion for authority to sell certain medium-term notes. I had a very brief conference with the parties to that motion as well as the creditor's committee. And they had each requested that I put off this hearing at least for a couple of hours until three P.M. today for various reasons. So that's what I'm doing. I'm going to adjourn today's hearing until three P.M. For those of you on the phone, I guess you can dial back in then. For those of you in the courtroom, you can try some of the fine cuisine of White Plains and come back at three if you want.

MR. DUBLIN: Thank you, Your Honor.

THE COURT: Okay, thank you.

(Recess)

THE COURT: Okay, good afternoon. We're back on the record in re Sears Holdings Corporation.

MS. MARCUS: Good afternoon, Your Honor. Jacqueline Marcus, Weil, Gotschal & Manges on behalf of Sears Holdings Corporation and its affiliated debtors. With me in court -- I was going to say this morning -- this evening are my partner, Ray Schrock, and my colleague, Jessie Mishkin.

THE COURT: Okay, good afternoon.

1 MS. MARCUS: I'm happy to report, Your Honor, that  
2 after a lot of arduous discussion since our hearing on  
3 Thursday, we now have resolution of the Debtor's motion for  
4 authority to sell the medium-term notes. Based on some  
5 proposed modifications to the order, which I'd like to hand  
6 up in a moment, Cyrus has indicated that it will withdraw  
7 the objection. And therefore the motion is unopposed and we  
8 would ask that the Court grant the motion.

9 I do want to note on the record, because it's  
10 referenced in the proposed order and I don't remember if we  
11 mentioned it on Thursday, that Jefferies had agreed to  
12 reduce its fees from two percent of the proceeds to 1.75  
13 percent of the proceeds. And that's important for purposes  
14 of the order. But if I may approach?

15 THE COURT: Okay, yes. You could hand that up.

16 MS. MARCUS: Your Honor, the form of the order  
17 that you have in front of you isn't actually the order that  
18 we'd like to hand up. Because when Cyrus made its post  
19 changes to the order, they didn't work from the revised  
20 order that we had filed subsequent to filing the motion. So  
21 with your permission at the conclusion of the hearing what  
22 we'd like to do is incorporate these comments into the right  
23 version of the motion -- of the order, excuse me, and ask  
24 the Court to enter that version. But I thought it would be  
25 helpful to walk through the proposed changes and see if the

1 Court had any questions.

2 So the first change is on Page 2 of the proposed  
3 order. And it references the withdrawal of the objection of  
4 Cyrus Capital Partners to the motion based on the negotiated  
5 provisions of the proposed order.

6 THE COURT: Right.

7 MS. MARCUS: At the end of Paragraph two there is  
8 a provision that has a proviso. After the Court authorizes  
9 the Debtors to sell the medium-term notes, the proviso says,  
10 "Provided that such authorization to sell the MTNs shall  
11 terminate -- " and Cyrus has asked for a change from the  
12 version that you have, " -- at the close of one business day  
13 following the date of the auction and any further  
14 authorization to sell all or any of the MTNs will be subject  
15 to Court approval."

16 THE COURT: Okay. And that timing works with the  
17 auction?

18 MS. MARCUS: Yes, it does.

19 THE COURT: It has to get sold at the auction?

20 MS. MARCUS: Yes, it does, Your Honor. And Cyrus  
21 has confirmed, and I'm sure Counsel will confirm if  
22 necessary, that the definition of the auction is the auction  
23 whenever it happens, be it November 26th or December 7th or  
24 whatever date that happens.

25 THE COURT: Okay.

1 MS. MARCUS: In Paragraph three, that's the  
2 paragraph that references the true-up.

3 THE COURT: Right.

4 MS. MARCUS: And the request is that the order be  
5 revised to provide that the true-up mechanism will be  
6 subject to the approval of the bankruptcy court.

7 THE COURT: And you have other language --

8 MS. MARCUS: That's correct.

9 THE COURT: -- that you already proposed that  
10 involved more parties in coming up with the true-up.

11 MS. MARCUS: That's correct. That's one of the  
12 places, Your Honor, where we'll incorporate that into the  
13 new version.

14 THE COURT: Okay. And I mean, I'm referring to the  
15 language that is in my binder, blacklined.

16 MS. MARCUS: Okay, we'll do that.

17 THE COURT: Okay.

18 MS. MARCUS: In Paragraph five, not indicated on  
19 your version, but a clarification requested by the  
20 creditor's committee is at the very beginning. So it will  
21 read, "Pursuant to Section 363(f) of the Bankruptcy Code,  
22 the MTNs shall be sold by the applicable debtors free and  
23 clear." And then the rest continues. And then there's the  
24 proviso at the end which says, "Provided, however, that the  
25 MTNs are not being sold free and clear of any liens or

1 claims, including without limitation to any counsel claim,  
2 defense, or right of set-off held or that may be asserted by  
3 SRAC or its estate, and nothing in this order shall impair  
4 or prejudice in any way any rights, claims, or defenses that  
5 SRAC or its estate may have in connection with the MTNs."

6 THE COURT: Okay. I appreciate this has been  
7 negotiated, but shouldn't this be provided -- shouldn't this  
8 say provided, however, that the MTNs are not being sold free  
9 and clear of any liens or claims constituting any  
10 counterclaim defense or right of setoff held or that may be  
11 asserted by SRAC or any liens or claims of SRAC?

12 MS. MARCUS: That's exactly the intent, Your  
13 Honor.

14 THE COURT: So any liens or claims of SRAC. That  
15 should be added then, of SRAC.

16 MS. MARCUS: Okay. So if we put of SRAC and we  
17 leave the rest of the language.

18 THE COURT: Because I mean, I don't know if the  
19 DIP lenders have a lien, for example, on the notes. But it  
20 would be free and clear of that.

21 MS. MARCUS: That was exactly what we were trying  
22 to pick up there, Your Honor.

23 THE COURT: Okay.

24 MS. MARCUS: In Paragraph six on the carryover  
25 page on top of Page 4. Provided however -- and this was a



1 change. But one of these changes actually is not going to  
2 be put in the order. The beginning says, "Provided however  
3 that notwithstanding the foregoing, the MTNs are not being  
4 sold free and clear of any liens, claims, or encumbrances."  
5 We'll put the same thing, of SRAC, there.

6 THE COURT: Right.

7 MS. MARCUS: And the deletion was something that  
8 the creditor's committee objected to. And Cyrus has agreed  
9 not to delete the language that preserves the rights with  
10 respect to inappropriate conduct. So in the order that we  
11 submit to you, that language will be there.

12 THE COURT: The language that's crossed out here.

13 MS. MARCUS: Correct.

14 THE COURT: Okay.

15 MS. MARCUS: And that's it in terms of the order,  
16 Your Honor.

17 THE COURT: Doesn't this language --

18 MS. MARCUS: It's the same language.

19 THE COURT: It's the same language. Okay, all  
20 right.

21 MS. MARCUS: I'm not quite sure why it's there  
22 twice.

23 THE COURT: Two belts and two suspenders, okay.

24 MS. MARCUS: It wasn't worth fighting that one.

25 THE COURT: All right, okay.

1 MS. MARCUS: And Your Honor, with that, if the  
2 Court grants the order, as we hope you will today, we intend  
3 to conduct the auction tomorrow probably starting at about  
4 noon. And hopefully we'll have some good news to report the  
5 next time we're before you.

6 THE COURT: Okay. The only question I have, I  
7 just want to confirm that SREC really just holds the  
8 intercompany claims. Does it have other significant assets?

9 MS. MARCUS: It does not, Your Honor.

10 THE COURT: So the true-up mechanism is really  
11 just the type of intercompany claim analysis for --

12 MS. MARCUS: That's correct, Your Honor.

13 THE COURT: -- people go through in Chapter 11  
14 cases all the time, and it will reflect the actual value of  
15 the intercompany claims.

16 MS. MARCUS: That's correct, Your Honor.

17 THE COURT: Which may be nothing when you get down  
18 to it.

19 MR. DUBLIN: Your Honor, Phil Dublin, Akin Gump.  
20 We're post counsel to the creditor's committee. We're still  
21 evaluating what assets are owned by each individual debtor  
22 entity. So it's possible we have a disagreement as to what  
23 SRAC ultimately owns and a true-up mechanism would work.  
24 But that should not impact approval of the motion today.

25 THE COURT: Okay. But it's not a -- it doesn't --

1 as far as we know it's not a crown-jewel asset that holds,  
2 you know, patents and lots of leases and things like that.

3 MR. DUBLIN: That's correct.

4 THE COURT: Okay.

5 MR. SCHROCK: That's -- Your Honor, Ray Schrock.

6 In fact it's a -- you know, was a financing subsidiary. And  
7 notably it's one of the debtors that's liable on nearly all  
8 of the debt within the capital structure.

9 THE COURT: Okay. All right. Does anyone have  
10 anything further to say on this motion as modified?

11 MR. KRELLER: Your Honor, just for the record.  
12 Thomas Kreller, Milbank, Tweed, Hadley & McCloy on behalf of  
13 Cyrus Capital Partners. Your honor, with the negotiated  
14 language, I would confirm, and Debtor's Counsel has  
15 accurately articulated all of the various changes that we've  
16 talked about and agreed to. And with those changes, we  
17 would withdraw our objection.

18 THE COURT: Okay.

19 MR. KRELLER: Not to be argumentative, I think the  
20 intercompany claim held by SRAC, while it is -- we would  
21 agree that it is an intercompany claim, it's significant in  
22 amount.

23 THE COURT: No, I'm not talking -- when I asked my  
24 question, I was focusing on things other than intercompany  
25 claim, financial --

1 MR. KRELLER: Understood, Your Honor. I just  
2 wanted to make --

3 THE COURT: I was focusing on, you know, other  
4 types of assets.

5 MR. KRELLER: Understood. It's our position, Your  
6 Honor, that is a very material asset.

7 THE COURT: It may. It may be.

8 MR. KRELLER: But we don't need to decide that --

9 THE COURT: Ultimately it's a claim or claims.

10 MR. KRELLER: Thank you, Your Honor.

11 THE COURT: Okay, all right. I will grant the  
12 motion as modified. Just to be clear, the language added  
13 that it's not free and clear of SRAC's rights. I believe  
14 it's consistent with applicable law, including the New York  
15 General Obligations Law and what a buyer of a claim gets.  
16 So for the reasons stated in the motion, this appears to be  
17 an opportunity that is time-sensitive. Although not as  
18 time-sensitive as it originally was, it still is time-  
19 sensitive for the debtors who own these notes to realize  
20 more value than they probably would otherwise realize on  
21 them by taking advantage of the pending auction.

22 I think to be safe and consistent with what one  
23 might derive from the AMR case and discussion of it  
24 (indiscernible) and the language in the indentures that says  
25 that while held by affiliates there is no distribution on

1 the notes. This order should also consensually lift the  
2 automatic stay to let the notes be sold. That would be  
3 applicable in SRAC's case under 362(d)(1).

4 MS. MARCUS: Thank you, Your Honor.

5 THE COURT: I'm not sure ultimately whether that's  
6 necessary, but there's an argument that could be made that  
7 it is necessary because it would turn arguably a claim that  
8 would not get any distribution into a claim that would at  
9 least have a right to a distribution if the value is there  
10 at the end of the day.

11 So I'll look for that order. The record's clear  
12 though as to what it should contain based on the hearing  
13 today and the blackline that I've previously been given. So  
14 you could get Jefferies working on their marketing.

15 Although one other comment, I'm sorry. The order  
16 just refers to Jefferies' commission. You may want to say  
17 1.75 percent commission just so that we don't forget that.

18 MS. MARCUS: Your Honor, if we may use the  
19 conference room for a little while --

20 THE COURT: Sure.

21 MS. MARCUS: -- I think we can get the order  
22 revised and submitted in short order.

23 THE COURT: That's fine. Thank you.

24 MS. MARCUS: Thank you.

25 (Whereupon these proceedings were concluded at 3:44 PM)

I N D E X

RULINGS

Page Line

Debtor's motion for authority to sell

the medium-term notes granted

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing  
transcript is a true and accurate record of the proceedings.

Sonya

Ledanski Hyde

Digitally signed by Sonya Ledanski  
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